

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
DEPARTMENT OF	)	
TRANSPORTATION,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. S11C-01-031 RFS
	)	
FIGG BRIDGE ENGINEERS, INC.	)	
and MACTEC ENGINEERING AND	)	
CONSULTING, INC.	)	
Defendants.	)	

**MEMORANDUM OPINION**

*Upon Defendant MACTEC's Motion to Dismiss.  
Granted in Part. Denied in Part.*

Submitted: October 19, 2011  
Decided: November 9, 2011

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STOKES, J.

This is the Court's decision on Defendant Mactec Engineers, Inc's ("Mactec") motion to dismiss Counts II and III of the Complaint filed by the State of Delaware, Department of Transportation ("DelDOT"). The breach of contract claim set out in Count II survives. The claim for negligent provision of information in Count III is dismissed.

Plaintiff DelDOT is the owner of the Indian River Inlet Bridge. DelDOT and Defendant Figg Bridge Engineers, Inc. ("Figg") entered a general construction contract ("the Contract" or "the Agreement") on June 17, 2003 for replacement of both the bridge and the roadway leading to it. In addition to providing construction, Figg was to prepare engineering studies and design to assist in the project. The Contract identified Figg's subcontractors for various aspects of the project and described their duties in detail. Defendant Mactec was named as the provider of geotechnical services, including on-site gathering of subsurface soil samples, measurement of groundwater levels, laboratory studies, as well as separate reports on the roadway and the bridge structure.

The next day, June 18, 2003, Figg, named as the Consultant, and Mactec, named as the Subconsultant, executed a Subcontract which provided for Mactec to perform the geotechnical work as described in the DelDOT/Figg Contract. Following various delays, Mactec submitted the geotechnical reports in April 2005, and construction began shortly thereafter.

After completion of the bridge and roadway, discrepancies arose between the actual soil settlement and the settlement information that had been provided by Mactec

and used in the construction. Significant portions of the embankment were removed and replaced from May through December 2008. Two independent consultants hired by DelDOT to analyze soil settlement confirmed that Mactec's soil analyses were inaccurate.

DelDOT initiated the Errors and Omissions process provided for in the Contract to determine financial obligations. Figg cooperated, but Mactec refused, maintaining that its role had been purely advisory.

DelDOT filed a Complaint against both Defendants, pursuing two routes for recovery against Mactec. In Count II of the Complaint, DelDOT alleges that it is a creditor third party beneficiary to the Figg/Mactec Subcontract and is thereby entitled to monetary damages. In Count III, DelDOT alleges Negligent Provision of Information, arguing that Mactec breached its duty as an information provider by supplying inaccurate and incomplete geotechnical information. Mactec moves to dismiss Counts II and III.

**Standard of review.** On a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pled facts or allegations in the complaint as true.<sup>1</sup> The Court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.<sup>2</sup> To warrant dismissal, the complaint must be without merit as a matter of fact or law.<sup>3</sup> The plaintiff will have every reasonable factual

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<sup>1</sup>*RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 WL 1442009 (Del. Super.).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

inference drawn in his favor.<sup>4</sup>

**Third party beneficiary.** Mactec argues that DelDOT has failed to state a claim as an intended third party beneficiary with enforceable rights under the Subcontract. DelDOT argues that the Subcontract shows Figg's intention to make DelDOT an intended third party beneficiary. As has been said, in every construction subcontract, the owner ultimately benefits, but this fact alone does not create a third party beneficiary relationship.<sup>5</sup>

The determination of third party beneficiary status rests on the parties' intent in forming the contract.<sup>6</sup> A third party may recover on a contract where the language shows that the promisee intended to secure the benefit for another either as a gift or in satisfaction of an obligation to that person.<sup>7</sup> As has been said, "It is universally recognized that where it is the intention of the promisee to secure performance of the

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<sup>4</sup>*Ramuno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

<sup>5</sup>*Pierce Associates, Inc. v. Nemours Foundation*, 865 F.2d 530, 538 (3d Cir. 1989)(applying Delaware law to contract which indicated intent to maintain separate owner-general contractor and contractor-subcontractor relationships).

<sup>6</sup>*Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d 211, 215 (Del. 1975).

<sup>7</sup> *Greater New York Mutual Ins. Co. v. Travelers Ins. Co.*, 2011 WL 4501207, \*3 (D.Del.); *Global Energy Finance LLC v. Peabody Energy Corp.*, 2010 WL 4056164, n. 84 (Del. Super.); *McClements v. Savage*, 2007 WL 4248481, \*1 (Del. Super.); *Eden v. Oblates of St. Francis de Sales*, 2006 WL 3512482, \*8 (Del. Super.); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, \*3 (Del. Ch. 2004); *Maglione v. BCBSD, Inc.*, 2003 WL 22853421, \*3 (Del. Super.); *Madison Realty Partners 7, LLC v. ISA Partnership Liquidity Investors*, 2001 WL 406268 (Del. Ch.); *Brown v. Allstate Ins. Co.*, 1997 WL 129345, \*3 (D.Del.); *William M. Young Co. v. Bacon*, 1991 WL (Del. Super.); *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 534 (Del. Super. 1990); *North America v. Waterhouse*, 424 A.2d 675, 679 (Del. Super. 1980).

promised act for the benefit of another, either as a gift or in satisfaction or partial satisfaction of an obligation to that person, and the promisee makes a valid contract to do so, then such third person has an enforceable right under the contract to require the promisor to perform or respond in damages.”<sup>8</sup>

The Restatement (Second) of Contracts § 302 requires a three-part showing. First, the contracting parties must have intended that the third party would benefit from the contract. Second, the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person. (Here, it is agreed that Mactec’s work was not intended to be a gift to DelDOT.) Third, the intent to benefit the third party must be a material part of the parties’ purpose in entering into the contract.<sup>9</sup>

Comment b to § 302 provides that the pre-existing obligation can create the third party status of a creditor beneficiary.<sup>10</sup> In this case, such status would exist if Figg owed DelDOT an obligation at the time of entering into the Subcontract, which provided for Mactec to fulfill that obligation.

The questions are whether the Subcontract evinces Figg’s intent to create rights in DelDOT for enforcing Mactec’s performance under the subcontract. The second question

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<sup>8</sup>*Insituform on North America, Inc. v. Chandler*, 534 A.2d 257, 268 (Del.Ch. 1987). *See also Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990)(creditor beneficiary status ultimately depends on whether promisee intended to confer a benefit on a third party).

<sup>9</sup>*Madison Realty Partners*, 2001 WL 406268, \*5.

<sup>10</sup>*See Pettit v. Country Life Homes, Inc.*, 2009 WL 846922, \*3 (Del. Super.).

is whether Mactec's performance would discharge Figg's duty to DelDOT for geotechnical field investigation and foundation studies under the Contract.

The first paragraph of the Subcontract identifies the parties as Figg and Mactec. In the next three paragraphs, the Subcontract defines DelDOT as the Owner; refers to the scope of services from the DelDOT/Figg Contract, a copy of which was provided to Mactec; and states the desire of both DelDOT and Figg to retain Mactec for the services defined in the Contract under Mactec's heading.

Article I, Section 1 describes Mactec's obligations under the Subcontract. It provides that Figg retains Mactec to complete work for the project "as required by the Consultant in his Agreement between the Owner and Consultant."

Section I also provides that Mactec was to provide services as required "of the Consultant in his Agreement between the Owner and Consultant for the project." It states that Mactec shall do the work in "accordance with the applicable requirements of the Agreement." These provisions show Figg's intent that Mactec's work would discharge Figg's obligation to DelDOT in the geotechnical aspect of the Agreement. It also binds Mactec to the terms of the DelDOT/Figg Agreement.

Article II describes compensation. Figg was to pay Mactec in accordance with the terms of the DelDOT/Figg Agreement. DelDOT would make payments to Figg based on progress reports prepared by Mactec and provided to DelDOT by Figg. Thus, Figg was the intermediary, while DelDOT made decisions as to payments in addition to making the

payments. The compensation provisions are further indication of Figg's intent to establish DelDOT as a creditor beneficiary.

Article III is entitled Compliance with the Provisions of the Agreement with the Owner. Its sole provision states that "Subconsultant agrees to abide by the provisions of the Consultant's Agreement with the Owner where those provisions are directly applicable to Subconsultant." This Article highlights what the Subcontract has already stated. The parties to the Subcontract intended the DelDOT Agreement to govern the essential aspects of Mactec's work. Mactec argues that if the parties wanted to create a creditor beneficiary they would have done so. Possibly, but the cases cited above show that many subcontracts without explicit provisions for a creditor beneficiary have been found to have created such a status.

In Article IV, Figg and Mactec indemnify each to the other without reference to DelDOT.

Article V provides that Mactec's conduit to DelDOT is Figg.

References to and definition of an owner in a subcontract have been found to contemplate provision of services to the owner, thereby establishing the owner as a third party beneficiary.<sup>11</sup> This subcontract defines DelDOT as the owner and refers to it repeatedly. The Subcontract binds Mactec to the terms of the Agreement, underscoring that Mactec's work is to be performed in order to benefit DelDOT. Payment comes from

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<sup>11</sup>*Oliver B. Cannon and Sons, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d at 215 (citing *Sears Roebuck and Co. v. Jardel*, 421 F.2d 1048 (3d Cir. 1970)).

DelDOT, with Figg serving as intermediary. Moreover, the Subcontract makes a separate provision in Article III that binds Mactec to the terms of the DelDOT/Figg Agreement, in which DelDOT agrees to pay for the work provided by specific subcontractors, including Mactec.

Although the indemnification clause does not refer to DelDOT, no single factor is dispositive here. Viewed collectively, the other factors show Figg's intent to establish DelDOT as a creditor beneficiary to the work to be provided by Mactec under the Subcontract. This intention was a material aspect of the Subcontract, as required by § 302 of the Restatement (Second) of Contracts.

In sum, the Subcontract reflects Figg's intent to establish DelDOT as a creditor beneficiary. The Subcontract also shows that Mactec's performance, accurately and completely provided, would have discharged a duty Figg owed DelDOT. The motion to dismiss Count II is denied.

**Negligent Provision of Information.** Mactec argues that Count III of the Complaint alleges a claim for negligent misrepresentation, an equitable claim which should be dismissed for lack of jurisdiction. Mactec also argues that Count III is not pled with particularity as required by Rule 9(b) for any type of fraud.

DelDOT maintains that Count III is not a claim for negligent misrepresentation. According to DelDOT, it is allegedly a simple negligence claim, premised on § 552 of the Restatement (Second) of Torts, Information Negligently Supplied for the Guidance of



Others. DelDOT asserts that this section creates an exception to the economic loss doctrine, which bars recovery in tort for damages unless the product is information. DelDOT argues that § 552 claims stemming from negligence are rightly heard at law.<sup>12</sup>

Count III alleges as follows. Mactec was an information provider with a duty to provide accurate information based on DelDOT'S pecuniary interest in the information. Mactec failed to exercise reasonable care in obtaining and communicating the information that it provided to and on behalf on DelDOT. DelDOT justifiably relied on the inaccurate information and suffered pecuniary loss as a result.

The first issue is whether Count III sounds in negligence or in negligent misrepresentation. In *Smith v. Peninsula Adjusting Co., Inc.*,<sup>13</sup> this Court dismissed a claim for negligent misrepresentation based on the Court's analysis that the claim in fact pled simple negligence. The issue arose again in *Atwell v. RHIS, Inc.*,<sup>14</sup> where the complaint included two counts of negligent misrepresentation. This Court recognized that one of the counts pled simple negligence, surviving the motion to dismiss. The other count was dismissed because Superior Court has no jurisdiction over the equitable claim

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<sup>12</sup>In the Opening Brief and at argument, DelDOT argued that Count III alleges professional negligence. The Delaware jury instruction for such a claim provides that "One who undertakes to render services in the practice of a profession or trade is always to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one." Delaware Pattern Jury Instruction Civil §8.1 (2000). This does not correspond to elements of Count III.

<sup>13</sup>2011 WL 2791255 (Del. Super.).

<sup>14</sup>2006 WL 2686532 (Del. Super.).

on negligent misrepresentation. In *Iacono v. Barici*,<sup>15</sup> this Court found that the defendant's motion to dismiss mischaracterized one of the counts as being for negligent misrepresentation when it was in fact a claim sounding in negligence.

Equity courts developed the claim of negligent misrepresentation and maintain exclusive jurisdiction over it in Delaware.<sup>16</sup> The elements of negligent misrepresentation are familiar: (1) a false misrepresentation, usually of fact; (2) with the intent to induce the plaintiff to act or refrain from acting; (3) which causes justifiable reliance on the misrepresentation; and (4) damage to the plaintiff as a result of the reliance.<sup>17</sup>

The Court notes first that there is an arguable difference between false information and inaccurate information. Second, DelDOT alleges that Mactec had a duty, not an

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<sup>15</sup>2006 WL 3844208 (Del. Super.).

<sup>16</sup>*Mark Fox Group, Inc. v. E.I. DuPont de Nemours*, 2003 WL 21524886, \* 5 (Del. Ch.)(citing *Pepsi-Cola Bottling Co. of Salisbury v. Handy*, 2000 WL 364199 (Del. Ch.)).

For Superior Court cases dismissing claims of negligent misrepresentation for lack of jurisdiction, see *Radius Services, LLC v. Jack Corrozi Construction, Inc.*, 2009 WL 3273509, \*2 (Del. Super.)(citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983)); *Iacono v. Barici*, 2006 WL 3844208 (Del. Super.); *Atwell v. RHIS, Inc.*, 2006 WL 2686532 (Del. Super.); *FA, Inc. v. Equipment Leasing Associates*, 2005 WL 3436605 (Del. Super.).

For Superior Court cases exercising jurisdiction over negligent misrepresentation claims, see *Palma, Inc. v. Claymont Fire Co. No.*, 2009 WL 3865395 (Del. Super.)(resolving a negligent misrepresentation claim under § 552 where jurisdiction was not raised); *Millsboro Fire Co. v. Construction Management Service, Inc.*, 2006 WL 1867705 (Del. Super.)(addressing negligent misrepresentation claim pursuant to § 552 exception and granting motion to dismiss because information in question was incidental to construction).

For treatment by federal court, see *Delaware Art Museum v. Ann Beha Architects, Inc.*, 2007 WL 2601472 (D.Del.)(applying § 552 under Delaware law but not addressing the jurisdictional issue).

<sup>17</sup>*Mark Fox Group, Inc. v. E.I. DuPont de Nemours & Co.*, 2003 WL 21524886, \*5 (Del. Ch.)(citing *Zirn v. VLI Corp.*, 681 A.2d 1950, 1961 (Del. 1996)).

intent. The duty was to provide information for guidance, not to induce to act or refrain from acting. The word “inducement” is defined as the “act or process of enticing or persuading another person to take a certain course of action.”<sup>18</sup> Mactec’s duties were to gather on-site samples, perform lab testing and provide reports. The reports were not intended to entice or persuade but to provide accurate information for reconstruction of the Bridge.

In addition, a plaintiff must show the existence of special equities, typically the existence of some form of fiduciary relationship.<sup>19</sup> Such a relationship between DelDOT and Mactec has not been pled, nor is there any indication of it. The only conclusion is that DelDOT did not plead negligent misrepresentation.

DelDOT argues that Count III is a § 552 claim for negligent provision of information. Section 552 creates a narrow exception to the economic loss doctrine which bars recovery for monetary damages in tort unless accompanied by bodily harm or property damage.<sup>20</sup> In *Council of the Dorset Condominium Apartments v. Dorset Apartments*,<sup>21</sup> this Court applied § 552 in a simple negligence suit, finding that engineers

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<sup>18</sup>Black’s Law Dictionary 845 (9<sup>th</sup> ed. 2009).

<sup>19</sup>*Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009)(citing *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, \*24 (Del. Ch.)); *Wal-Mart Stores, Inc. v. AIG Life Ins.*, 2006 WL 3742596 (Del. Ch.).

<sup>20</sup>*Christiana Marine Services Corp. v. Texaco Fuel and Marine Mktg., Inc.*, 2002 WL 1335360, at \*4 (Del. Super.).

<sup>21</sup>1992 WL 240444 (Del. Super.).

are information providers and provided information rather than plans such as might be provided by architects.

Although § 552 was adopted in *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*,<sup>22</sup> Mactec argues that § 552 has subsequently been repudiated.<sup>23</sup> Mactec does not address the difference between negligent misrepresentation and negligent provision of information. Section 552 provides in part as follows:

§ 552. Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) . . . The liability stated in Subsection (1) is limited to loss suffered  
(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply it; and  
(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Comment a. to § 552 provides that “the rule stated in this Section is based upon negligence of the actor in failing to exercise reasonable care or caution in supplying correct information. . . .” This is the essence of Count III.

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<sup>22</sup>583 A.2d 1378 (Del. Super. 1990).

<sup>23</sup>*Atwell v. RHIS, Inc.*, 2006 WL 3436605 (Del. Super.); *FA, Inc. v. Equipment Leasing Associates*, 2005 WL (Del. Super.); *Mark Fox Group Inc. v. E.I. DuPont de Nemours & Co.*, 2003 WL (Del. Ch.).

This claim requires a plaintiff to allege two things. The first is that the defendant supplied the information to the plaintiff for use in business transactions with third parties. The second is that the defendant is in the business of supplying information.<sup>24</sup> DelDOT does not plead that the geotechnical reports were intended for use with a third party. It cannot be said that DelDOT relied on the reports to pursue a business transactions with Figg because the DelDOT/Figg Contract was executed long before Mactec's reports were prepared.

This element was successfully pled in *Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing, Inc.*<sup>25</sup> In that case, Texaco told the Marine Service that it would deliver certain amounts of oil to the marina every month. Based on that information, Christiana secured additional financing from a third person bank.

In this case, DelDOT has not pled that it relied on the information in any third party business transactions. Even with every favorable inference drawn its favor, there is no way for DelDOT to show that it relied on the geotechnical reports in transactions with other parties. Count III fails on this point. Thus, the question of whether Mactec is a pure information provider is not reached. Because discovery would not change the result, dismissal is appropriate. Mactec's argument that the claim is not pled with the particularity required for fraud is moot.

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<sup>24</sup>*Delaware Art Museum v. Ann Beha Architects, Inc.*, 2007 WL 2601472 (D.Del.).

<sup>25</sup>2002 WL 1335360 (Del. Super.).

**Conclusion.** Mactec's motion to dismiss Count II alleging breach of contract is  
**DENIED.** The motion to dismiss Count III alleging negligent provision of information is  
**GRANTED.**

**IT IS SO ORDERED.**

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Richard F. Stokes

cc: Prothonotary